BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY A. LOCKE	)	
Claimant	)	
VS.	)	
	)	
BARNDS BROTHERS, INC.	)	Docket No. 1,059,568
Respondent	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the December 12, 2013, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on April 8, 2014.

APPEARANCES

Keith V. Yarwood of Kansas City, Missouri, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Claimant stipulated respondent had sufficient work to employ claimant 40 hours each week within the restrictions of Drs. Chris D. Fevurly and Michael J. Poppa, but he simply cannot work 40 hours per week. Claimant also stipulated he has a 66⅔% task loss based upon Dr. Poppa's restrictions and Michael J. Dreiling's task analysis. Respondent stipulated claimant's whole body functional impairment rating qualified claimant for a work disability. The parties stipulated that if the Board finds claimant is entitled to a work disability, claimant sustained a 46% wage loss. The parties agreed to allow the Board to

consult the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[1] in making its decision.

ISSUES

ALJ Hursh determined claimant met the conditions required for work disability set forth in K.S.A. 2011 Supp. 44-510e. The ALJ found claimant sustained a 15% whole body functional impairment and a 46.5% work disability (based upon a 47% task loss and a 46% wage loss). The ALJ also awarded claimant future medical benefits.

With regard to wage loss, the ALJ stated:

> The record showed the claimant's post-injury wage loss is directly attributable to the injury and failed to rebut the presumption on actual post-injury wage. Simply, the court felt the claimant was telling the truth about how much he can work even though none of the physicians imposed a restriction on his hours. The court did not think the claimant was creating a false impression of his capabilities. He is making an honest effort to remain employed.[2]

Respondent contends this is not a work disability case. Respondent maintains that "to allow this or any claimant to self-limit the number of hours he or she will work secondary to a subjective complaint such as pain, in the absence of permanent work restrictions regarding the number of hours a claimant can work, is to effectively thwart the [2011] legislative revisions to K.S.A. 44-510e."[3] Respondent otherwise asks the Board to affirm the ALJ and adopt the 15% whole body functional impairment opinion of Dr. Fevurly, including his functional impairment rating of claimant's left lower extremity. In its Application for Review and brief to the Board, respondent lists as an issue whether claimant is entitled to receive future medical treatment. However, respondent did not provide any argument or authority in its brief as to why claimant should not be entitled to future medical treatment. Nor did the parties discuss this issue at oral argument. Therefore, the Board deems this issue waived by the respondent.

Claimant requests the Board find he sustained a 31.5% left lower extremity functional impairment, a 15% whole body functional impairment for his back, a 66⅔% task loss and he requests an award for a 56⅓% work disability (averaging the task loss with the

---

[1] The parties did not specify the Board's request to consult the American Medical Association, *Guides to the Evaluation of Permanent Impairment* was limited to the 4th Edition.

[2] ALJ Award at 5.

[3] Respondent's Brief at 2-3 (filed Jan. 28, 2014).

46% wage loss). With regard to the wage loss, claimant cites *Graham*[4] and states wage loss is simply calculated based on the difference between the pre-injury weekly wage and post-injury weekly wage.

The issues before the Board on this appeal are:

1. What is claimant's functional impairment?

2. What, if any, is claimant's work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On August 12, 2011, claimant was servicing an air conditioner on top of a building. It was raining and as claimant descended a ladder, his foot slipped and he fell. Claimant shattered his left heel and underwent surgery on August 16, 2011, by Dr. Molly Black. Claimant also sustained a herniated disk at L4-5 and underwent surgery on October 31, 2011, by Dr. Robert M. Beatty. Respondent conceded claimant sustained left lower extremity and back injuries by accident arising out of and in the course of his employment. A further discussion of the details of claimant's injuries is unnecessary.

On December 22, 2011, Dr. Black released claimant to full duty for half days for four weeks and then to full days without restrictions. Claimant returned to see Dr. Black in June 2012 because of left foot pain. On July 18, 2012, Dr. Black removed hardware from claimant's left foot. The doctor allowed claimant to return to full duty for five hours a day from August 6 to August 13, 2012, and to full duty without restrictions on August 13. Dr. Black later testified if claimant has trouble with uneven surfaces and ladder climbing, he should not work on unprotected heights. When asked if she had any other restrictions, the doctor indicated claimant should undergo a functional capacity evaluation. On cross-examination, when asked if she told claimant to let pain be his guide, Dr. Black stated she did not recall that specifically, but she often says that to patients. The doctor indicated claimant should not perform a task that causes him left ankle pain.

On October 31, 2011, Dr. Beatty performed a lumbar microendoscopic decompression and removal of a disc protrusion to repair claimant's lumbar disk herniation. The doctor last saw claimant on December 22, 2011. Dr. Beatty restricted claimant for three months to lifting no more than 40 pounds, with the anticipation that after the three-month period, claimant would need no restrictions. When asked why he gave claimant no restrictions after three months, Dr. Beatty testified: "Well, the way we can do surgery now

[4] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

with the minimally invasive techniques it's less disruptive to the normal structure of the spine. I think people can get along pretty well without having permanent restrictions."[5] On cross-examination, Dr. Beatty testified:

> Q. If it hurts him [claimant] to do something should he do that?
>
> A. I think it would be counterproductive to do that. I think the body's telling you that there's an issue there and probably shouldn't push through it in most circumstances. If it's tiredness just because the muscles aren't toned then, yes, I think pushing through discomfort to tone those muscles can be advantageous in the long run.[6]

Dr. Beatty indicated he has never been asked to give a task loss opinion in a Kansas workers compensation case. He averred if an individual has no restrictions, he or she should be able to perform every facet and task of the job he or she previously performed. On August 30, 2012, Dr. Beatty sent a letter to an insurance adjustor indicating claimant had a 15% functional impairment rating for the low back disk herniation. Dr. Beatty indicated he consulted Table 75 of the AMA *Guides*[7] when providing the rating.

At the request of respondent, claimant was evaluated by Dr. Chris D. Fevurly on August 29, 2012. Utilizing the AMA *Guides*,[8] Dr. Fevurly opined claimant had a 15% left lower extremity functional impairment for intra-articular subtalar joint fracture and a 15% left lower extremity functional impairment for loss of range of motion which combined for a 28% functional impairment to the left lower extremity. The doctor then converted the 28% left lower extremity functional impairment to a 17% whole body functional impairment. For claimant's back injury, the doctor placed claimant in DRE Lumbosacral Category III for a 10% whole body functional impairment. Using the Combined Values Chart, Dr. Fevurly determined claimant had a 25% whole body functional impairment. The doctor's only work restrictions were: climbing of ladders should rarely be performed and work on uneven surfaces should be limited to an occasional basis.

---

[5] Beatty Depo. at 9.

[6] *Id.* at 21.

[7] Dr. Beatty was not asked nor did he specify the edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to which he was referring.

[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

On January 11, 2013, in response to a letter from respondent's counsel, Dr. Fevurly indicated he made errors in calculating claimant's functional impairment. The doctor opined claimant had a 15% functional impairment to the left lower extremity for intra-articular subtalar joint fracture, which converted to a 6% whole body functional impairment. The doctor testified:

> You can only use the DRE -- or the diagnostic based estimates as the single approach for doing that. And you can't combine that with the range of motion model, because that already takes into consideration the range of motion. So it would be duplicative to add that, and I was incorrect to do that the first time. So he has a 15 percent left lower extremity impairment for that.[9]

Dr. Fevurly's functional impairment rating of claimant's back remained unchanged, as did claimant's work restrictions. Using the Combined Values Chart, Dr. Fevurly determined claimant had a 15% whole body functional impairment. Based on the restrictions he gave claimant, Dr. Fevurly opined claimant could no longer perform 6 of 27 job tasks identified by vocational expert Michelle Sprecker for a 23% task loss.

Dr. Fevurly disagreed with Drs. Black and Beatty that claimant should avoid activities that cause him pain, unless there was an underlying impairment or problem that would be harmed by the activities. Dr. Fevurly testified, "pain is not to be used as a basis for determining restrictions and limitations written by physicians."[10]

Claimant, at the request of his attorney, was evaluated by Dr. Michael J. Poppa on October 2, 2012. For claimant's left lower extremity, Dr. Poppa determined claimant had a functional impairment of 17% for decreased ankle strength involving plantar flexion graded 4/5, 12% as a result of decreased ankle strength involving dorsiflexion graded 4/5, 2% as a result of decreased ankle inversion and eversion and 10% as a result of chronic sprain/strain/calcaneal fracture requiring three surgeries. The doctor cited the table and page number of the *Guides* (4th ed.) for each impairment rating, except for the 10% left lower extremity impairment as a result of chronic sprain/strain/calcaneal fracture requiring three surgeries. For that impairment, the doctor relied on his education, training and experience in occupational medicine. Using the Combined Values Chart of the *Guides* (4th ed.), Dr. Poppa determined claimant had a 35% functional impairment of the left lower extremity, which converted to a 14% whole body functional impairment.

Dr. Poppa explained claimant sustained more injuries to his left lower extremity than just a subtalar joint intra-articular fracture and that is why his left lower extremity functional impairment rating differed from Dr. Fevurly's. Dr. Poppa indicated claimant had objective findings of decreased strength involving plantar flexion and dorsiflexion, decreased range

---

[9] Fevurly Depo. at 20.

[10] *Id.* at 35.

of motion in the left ankle and chronic left ankle sprain. Dr. Poppa indicated Dr. Fevurly placed more emphasis on calf atrophy instead of decreased strength. The doctor testified, "You can have calf atrophy but still demonstrate normal strength. So I think that's not necessarily the best way of doing it. My way would be better. It takes into consideration the physical findings and all injuries or conditions associated with the injury Mr. Locke sustained."[11]

With respect to claimant's back injury, Dr. Poppa assigned claimant a 20% whole body functional impairment for radiculopathy and erroneously placed claimant in DRE Lumbosacral Category III. The doctor also assigned claimant a 5% whole body functional impairment for chronic musculoligamentous sprain-strain associated with his work injury based upon Table 72, DRE Lumbosacral Category II on page 110 of the *Guides* (4th ed.). Dr. Poppa indicated claimant's left lower extremity and back functional impairments combined for a 34% whole body functional impairment.

In a letter to claimant's attorney dated March 1, 2013, Dr. Poppa reduced claimant's whole body functional impairment for the radiculopathy from 20% to 10%. Dr. Poppa testified he realized he had erred after reading Dr. Fevurly's report. The doctor then revised his whole body functional impairment from 34% to 27%. Dr. Poppa explained that he and Dr. Fevurly assigned claimant a 10% whole body functional impairment for radiculopathy. However, Dr. Poppa testified he also assigned claimant a 5% whole body functional impairment for chronic musculoligamentous sprain-strain associated with his work injury based upon Table 72, DRE Lumbosacral Category II on page 110 of the *Guides* (4th ed.).

Dr. Poppa testified he provided two separate whole body functional impairment ratings for claimant's back because claimant had two separate physical back conditions. When asked to point to a section of the *Guides* (4th ed.) that allows different DRE category ratings for the same regional body part, Dr. Poppa testified: "I can't find anything where it limits a physician nor can I find it that says you can only use one."[12]

On May 31, 2013, in a letter to claimant's attorney, Dr. Poppa indicated claimant's restrictions were: no lifting greater than 25 pounds on an occasional basis, no ladder climbing, no running or jumping and no work on unprotected heights. The doctor also stated claimant should be afforded the opportunity to alternate between seated duties and standing duties on an as needed basis for pain control and should limit waist bending, stooping or turning greater than four times per minute. Dr. Poppa testified in detail as to why claimant could no longer perform 10 of 14 tasks identified by Mr. Dreiling for a 71% task loss.

---

[11] Poppa Depo. at 13.

[12] *Id.* at 61.

On cross-examination, Dr. Poppa agreed he did not place any restrictions on claimant's ability to work a 40-hour week. However, he testified:

> As I stated in the initial report, dated October 4th, as it relates to employment, "Mr. Locke currently remains employed at Barnds Brothers, Inc., with some accommodations. However, if he is unable to continue performing those duties, then permanent restrictions would be necessary." That would apply to hours worked per week, per day.[13]

At the time of the accident, claimant was a heating and ventilation service technician, but also performed other duties. He made $23 per hour and worked 45 to 50 hours per week. After his surgeries, claimant returned to work for respondent and worked approximately 80 hours during three two-week periods. However, for the pay periods ending November 19, 2012, through March 11, 2013, claimant worked from 1.5 hours to 78.89 hours every two weeks.

Claimant testified that because he felt he could no longer maintain performance levels expected of him in the past, he provided respondent with a letter of resignation on March 4, 2013. Claimant, also at the regular hearing, indicated he was aware that if he resigned, he could not pursue a claim for work disability. In response, respondent offered to employ claimant in a capacity that demanded lower physical demands and claimant accepted. However, claimant testified the physical demands did not change after he provided respondent the March 2013 resignation letter. For the pay periods ending March 25, 2013, through April 22, 2013, claimant worked 46.03 hours to 65.92 hours every two weeks.

Claimant again provided respondent a letter of resignation on April 29, 2013. In order to keep claimant employed, respondent agreed to take out the more physical part of claimant's job, provided him with help, increased claimant's wages to $25 per hour and permitted claimant to reduce his hours to 20 to 25 hours per week. Claimant continues to receive fringe benefits as though working full time. Claimant indicated he could work 40 hours or more per week for respondent if there was work available that he physically could perform. After the April 29 resignation letter, claimant worked 37.08 to 58.7 hours every two weeks.

After the April 2013 resignation letter, claimant no longer performed heating and air conditioning tune-ups and he asked for help digging up wiring that needed repairing. Claimant testified:

> Q. Okay. Why don't you work more?

---

[13] *Id*. at 36.

A. Because of my back pain and my foot pain. I get up in the morning and I can't stand up or I have a bad night because I've woken up several times during the night and I don't feel like I could get in his van and drive comfortably and perform my job that needs to be done.

Q. Okay. And when you have those problems when you wake up in the morning, what do you do?

A. I call Mr. Barnds and let him know that I won't be in today.

Q. And what does Mr. Barnds usually say to you?

A. "Okay. We'll see you tomorrow."

Q. Has he ever told you that if you don't come in, he's going to terminate you?

A. No.[14]

Claimant indicated if he is out in the field and comes across a situation he cannot physically perform, he calls the office and someone is sent out to assist him.

Claimant testified at the regular hearing he has sharp pain in his low back that sometimes radiates into his left leg. On a scale of one to ten, with ten the highest level of pain, claimant's worst pain is a seven and his least pain is a two. If his pain is at level seven, claimant uses Tramadol to get it down to a level two. Overuse of claimant's back, bending, twisting and climbing in and out of the work van make his pain worse. Claimant testified he also has pain in his left foot and walking on uneven surfaces hurts his foot. Cold weather causes sharp pain in his back and left foot.

Claimant reviewed the task loss analysis prepared by vocational expert Michael J. Dreiling and found it to be accurate. Claimant reviewed each job task and indicated he could no longer perform 11 of 14 tasks and detailed the reasons he could no longer do so. With regard to task 11, claimant testified he could service, but not install, low-voltage lighting systems.

Ronald Barnds, respondent's president, testified claimant was a good, hardworking, competent and knowledgeable employee who never refused to perform an assigned task. Claimant concentrated on heating and cooling work, performed fountain maintenance, exterior lighting maintenance, light plumbing and light electrical. Mr. Barnds reviewed the task list prepared by Mr. Dreiling and indicated it was accurate with the possible exception of task 11.

[14] R.H. Trans. at 33.

After claimant was allowed to return to full duty in March 2012, Mr. Barnds noticed claimant would complain how sore he was the next day after a job or how fatigued he would get. Claimant would ask permission to go home early and Mr. Barnds would acquiesce. Before his injury, claimant would work until 5 or 5:30 p.m. On one occasion when claimant decided to resign and take a job working at the counter at a parts store, Mr. Barnds told claimant:

> I said you ought to stay here, you know, you only want to work 25, 30 hours a week, that's fine, we won't have any ladder work, you won't have to clean gutters, you won't have to service swimming pool[s], fountains, things that require you to bend over a lot, you can write bid specs, you can do, you know, building inspections like coming in here if it's empty, making sure the lights work, air-conditioning, you're just kind of -- you're doing a security check, basically, unlock doors. We do a lot of that, so I can -- I mean, I listed the things that I -- I said I think this will keep you busy 25 to 40 hours a week, I have 40, 45 hours a week, but I can get by with you 25 or 30 hours.[15]

Mr. Barnds also testified:

> Q. So when he says he's sore, you believe him?
>
> A. I believe him, yeah. I've seen him walk. He walks with a cane now, he definitely -- the incident has aged him mentally and physically.[16]
>
> . . .
>
> I mean, after working with him now, I can tell he's physically weaker than he was before the injury, but I would probably be too.[17]
>
> . . .
>
> Q. So what happened after -- well, let me go back to [claimant's March 4, 2013, resignation] letter.
>
> A. So he resigned and I said, Jeff, let's rework your job description. Let's remove the gutter cleaning, let's remove the pools, I said I think your -- I think you can still -- he struggled a little bit when he came back and that's why the second resignation came five, six weeks later.
>
> Q. When --

---

[15] Barnds Depo. at 17.

[16] *Id.* at 18-19.

[17] *Id*. at 40.

> A. Because he was trying to work a 40-hour week. I don't think Jeff is up to a 40-hour week.[18]
>
> . . .
>
> Q. Do you have any reason to believe but for the injury that he had in August of 2011, that he wouldn't still be working 40 hours plus a week?
>
> A. If he wasn't injured, I know he'd be working that many hours, yeah. Strongly, you know. Because he's a team player and the other guys that work around him work that many hours. . . .[19]

Mr. Barnds indicated it was his idea for claimant to work 20, 25 or 30 hours a week. He also indicated he had enough work for claimant to do within the restrictions of rarely climbing ladders and occasional work on uneven surfaces to keep claimant employed 40 hours or more per week.

Mr. Dreiling, a vocational consultant, performed a vocational assessment and task analysis of claimant at the request of his attorney. Mr. Dreiling indicated pain can be a limiting factor on a person's ability to obtain and maintain employment, considering the type of work they do. He opined pain was a factor in claimant's capability to work. Mr. Dreiling opined claimant likely would not be able to get a part- or full-time job paying $25 per hour other than with respondent. He testified claimant would likely start between $10 and $13 per hour at a similar job elsewhere.

On cross-examination, Mr. Dreiling admitted the restrictions of Dr. Poppa did not limit the number of hours per week claimant could work and the medical evidence he had indicated claimant would be capable of working 40 hours or more per week. Mr. Dreiling testified:

> Q. And without any medical restrictions limiting the number of hours, would that be a subjective incapability of him working 25 or more than 25 hours per week? It's based on what he feels he can't do. Would you agree with that?
>
> A. Right. It looks like it's a combination of what he feels he can do and what the employer accepts from the worker.[20]

At the request of respondent, Ms. Sprecker, a qualified rehabilitation professional in the state of Kansas, performed a vocational assessment and task analysis of claimant.

---

[18] *Id.* at 44-45.

[19] *Id.* at 62.

[20] Dreiling Depo. at 32.

She indicated Drs. Black, Beatty, Fevurly and Poppa did not restrict claimant from working 40 hours per week. Ms. Sprecker testified that based on the restrictions of Drs. Beatty and Black and after reviewing Mr. Barnds' deposition transcript, claimant could earn at least 90% of his pre-injury average weekly wage. When asked if she could identify physical restrictions based upon the admonishment of Drs. Black and Beatty that claimant not perform activities causing him pain, Ms. Sprecker indicated she was not qualified to identify physical restrictions.

The ALJ determined claimant had a 15% whole body functional impairment, stating:

> Dr. Poppa's rating employed two DRE Categories when it appeared that under the *Guides*, 4th Edition, the Categories are not supposed to be applied cumulatively. Poppa took into account an ankle sprain, which no other physician, including the foot expert who treated the claimant, Dr. Black, diagnosed. And Dr. Poppa rated the foot injury, in part, on standards other than the *Guides*, 4th Edition, although the 4th Edition clearly contains impairments for the foot and lower extremity. Dr. Beatty did not state if his impairment was based on the *Guides*, 4th Edition, and his 15% rating did not correspond to a DRE Category. For these reasons, the court found flaw with Dr. Poppa's and Dr. Beatty's ratings and was more persuaded by Dr. Fevurly's ratings. It is held the claimant's permanent functional impairment is 15% to the body as a whole.[21]

With respect to claimant's wage loss, the ALJ found:

> The second condition for work disability is that the employee has sustained a post-injury wage loss of at least 10% which is directly attributable to the injury, K.S.A. 44-510e(a)(2)(C)(ii). The parties stipulated into the record wage information on the claimant's post-injury earnings with the respondent. The wage information showed that since the claimant returned to work post-injury on March 12, 2012, he has earned $685.84 per week on average. Compared to the $1,071.70 average weekly wage, the claimant has a 46% post-injury wage loss.
>
> However, K.S.A. 44-510e(a)(2)(E) states that where an employee is engaged in post-injury employment for wages, the employee's actual post-injury earnings create a rebuttable presumption the actual earnings are the post-injury average weekly wage the employee is capable of earning. In this case, the claimant returned to accommodated employment with the respondent, but has chosen to work less than full time, which has resulted in the wage loss. No physician placed a work restriction on the claimant limiting the number of hours he can work, and the respondent's president, Ronald Barnds, testified he could provide the claimant enough hours to return the claimant to a weekly wage comparable to the average weekly wage, if the claimant chose to work the hours. So, the question was

[21] ALJ Award at 4.

> whether the claimant's self-limitation on hours rebuts the presumption his post-injury earnings are the average post injury weekly wage he is capable of.
>
> The claimant testified he works fewer hours due to back and foot pain. He said he twice resigned his employment, but each time Ronald Barnds asked him to come back with a promise of additional accommodation and the claimant accepted. Ronald Barnds testified the claimant is a very good, knowledgeable employee and that he is happy to keep the claimant working for him at whatever amount of hours or amount of duties the claimant can manage. Barnds confirmed the claimant takes occasional afternoons and whole days off which the claimant attributes to the work injuries.
>
> Barnds further stated the claimant now uses a cane, which the claimant never used before the work accident, and that the claimant appears "aged" since the accident.
>
> The record showed the claimant's post-injury wage loss is directly attributable to the injury and failed to rebut the presumption on actual post-injury wage. Simply, the court felt the claimant was telling the truth about how much he can work even though none of the physicians imposed a restriction on his hours. The court did not think the claimant was creating a false impression of his capabilities. He is making an honest effort to remain employed.
>
> It is therefore held the claimant's post injury wage loss is 46% and the second condition for work disability is met.[22]

The ALJ averaged Dr. Fevurly's 23% task loss opinion with Dr. Poppa's 71% task loss opinion for a 47% task loss. The ALJ then determined claimant had a 46.5% work disability by averaging claimant's 47% task loss and 46% wage loss.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[23] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[24]

---

[22] *Id.* at 4-5.

[23] K.S.A. 2011 Supp. 44-501b(c).

[24] K.S.A. 2011 Supp. 44-508(h).

Functional Impairment

Respondent asks the Board to affirm the ALJ and adopt the 15% whole body functional impairment opinion of Dr. Fevurly, including his functional impairment rating of claimant's left lower extremity. Claimant requests the Board average Dr. Poppa's 35% left lower extremity functional impairment rating with Dr. Fevurly's initial 28% rating for a 31.5% left lower extremity functional impairment. Claimant also requests the Board adopt Dr. Beatty's 15% whole body functional impairment opinion for claimant's back injury.

With respect to the lower extremity, the *Guides* (4th ed.) states: "In general, only one evaluation method should be used to evaluate a specific impairment. In some instances, however, as with the example on p. 77, a combination of two or three methods may be required."[25] In the example at page 77, a 45-year-old woman had a fractured tibia, then months after the injury, when the residua were stable, she had lost half of her ankle flexion and extension motion and had severe, permanent stiffness of all toes.

Dr. Fevurly used the DRE method only to award claimant a 15% left lower extremity functional impairment. Dr. Poppa opined claimant had more than one left lower extremity ratable condition. He opined claimant had a 35% functional impairment of the left lower extremity. The Board finds both functional impairment ratings credible and averages them for a 25% left lower extremity functional impairment, which converts to a 10% whole body functional impairment.

With respect to the whole body functional impairment for claimant's low back impairment, the Board agrees with the ALJ that Dr. Poppa's rating is in error because he used two DRE categories and applied them cumulatively. The *Guides* (4th ed.), at page 94, indicates the injury model or DRE model assigns a patient to one of eight categories. In the case of a lumbosacral injury, a patient is assigned to one of the eight lumbosacral categories. Dr. Poppa's belief that a patient can be in two different DRE Lumbosacral Categories for two lumbosacral injuries arising out of the same accident is erroneous. The DRE Lumbosacral Categories were established in a manner so the worse the patient's back impairment, the higher the DRE Lumbosacral Category to which he or she is assigned.

The ALJ found invalid Dr. Beatty's functional impairment opinion because the doctor testified his whole body functional impairment for claimant's lumbosacral injury was in accordance with the *Guides*, but did not specify which edition. Dr. Beatty testified he consulted Table 75 of the *Guides*, but was not asked which edition. The parties agreed the Board could consult the *Guides*. Table 75 of the *Guides* (4th ed.) clearly deals with whole person spine impairments. The Board notes there is no Table 75 in the 3rd Edition Revised, 5th Edition or 6th Edition of the *Guides*. The Board finds Dr. Beatty's 15% whole

[25] *Guides* (4th ed.) at 75.

body functional impairment opinion is credible and in accordance with the *Guides* (4th ed.). Dr. Beatty was claimant's treating physician and saw claimant for his back injury on more occasions than Drs. Poppa and Fevurly combined.

Thus, the Board finds claimant sustained a 10% whole body functional impairment for the left lower extremity injury and a 15% whole body functional impairment for his back injury. Using the Combined Values Chart of the *Guides* (4th ed.), claimant has a 24% whole body functional impairment.

Work Disability

K.S.A. 2011 Supp. 44-510e(a) states:

> (a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.
>
> (1) Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.
>
> (2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:
>
> (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
>
> (ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or
>
> (iii) the loss of or loss of use of both eyes.
>
> (B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

> (ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.
>
> (iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.
>
> (F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66⅔%; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable.
>
> (3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.
>
> The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

In K.S.A. 2011 Supp. 44-510e(a)(2)(E), there is a rebuttable presumption the post-injury average weekly wage earned by an employee constitutes the post-injury average weekly wage the employee is capable of earning. There is also a rebuttable presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) that an injured worker's refusal of accommodated work offered within the worker's restrictions as established by the authorized treating physician at a wage equal to 90% or more of the pre-injury average weekly wage shall result in no wage loss. Respondent asserts the foregoing rebuttable presumptions nullify each other. While the aforementioned rebuttable presumptions may be at odds with each other, the Board disagrees with respondent's analysis they cancel

each other. Both presumptions must be considered by the Board, as the law does not state the presumptions nullify each other.

The Board first addresses the presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E) that the post-injury average weekly wage earned by an employee constitutes the post-injury average weekly wage the employee is capable of earning. Respondent argues it has provided ample evidence to rebut that presumption. Claimant contends that if he honored the advice of Drs. Black and Beatty to avoid work activities that cause him pain, respondent had insufficient work to employ him 40 hours per week. Claimant asserts he would work 40 hours or more a week, but cannot do so because of debilitating pain. He asks the Board to find the presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E) has not been rebutted.

Drs. Black and Beatty's admonishment claimant should avoid activities causing pain is not a restriction. The only potential restriction either of those physicians gave was when Dr. Black later testified claimant should not work on unprotected heights. Claimant conceded respondent had 40 hours of work per week available within the restrictions of Drs. Fevurly and Poppa. No physician who examined claimant restricted the number of hours he could work. To summarize, Dr. Beatty gave claimant no restrictions, Dr. Black possibly gave a single restriction of no working on unprotected heights and Drs. Fevurly and Poppa provided restrictions as set forth above. Respondent had work available, 40 hours per week, within the restrictions of all four physicians. Therefore, the Board concludes claimant was capable of working 40 hours per week or more and earning a wage equal to 90% or more of his pre-injury average weekly wage and respondent has rebutted the presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E).

The Board next addresses respondent's contention the rebuttable presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) applies and has not been rebutted by claimant, such that claimant sustained no wage loss. Respondent asserts claimant, because of pain, self-limited his work hours to 20 to 30 hours each week. Respondent characterizes that as a refusal to perform accommodated work. Respondent argues claimant should not be allowed to self-limit his work activities and hours because of a doctor's admonishment not to perform tasks causing pain. According to respondent, claimants could artificially create or inflate a wage loss by limiting their work activities and hours because of subjective complaints of pain.

Drs. Black and Beatty were claimant's treating physicians and saw claimant more frequently and had a better understanding of his condition than did the hired experts, Drs. Fevurly and Poppa. The Board disagrees with the ALJ's finding that the lack of work restrictions by Drs. Black and Beatty was unpersuasive. Part of the ALJ's reasoning was that claimant was seen more recently by Drs. Fevurly and Poppa than Drs. Black and Beatty. The Board finds that reasoning unconvincing. Claimant was examined by Dr. Fevurly on August 29, 2012, and Dr. Poppa on October 2, 2012. Dr. Black last examined claimant on August 1, 2012, and Dr. Beatty on December 22, 2011. There is

nothing in the record to indicate claimant's medical condition changed significantly between the dates he was last examined by Drs. Black and Beatty and the time he was evaluated by Drs. Fevurly and Poppa.

Dr. Beatty indicated claimant had a microendoscopic decompression and removal of a disc protrusion that was minimally invasive. Dr. Beatty indicated claimant got along fairly well after surgery and the doctor did not feel a need for providing restrictions.

Because claimant was not given any restrictions by his authorized treating physicians, there was no necessity to provide claimant with accommodated work. Simply put, because no authorized treating physician imposed restrictions upon claimant, he could return to his former job activities, working the same hours he worked prior to his accident. Therefore, the presumption contained in K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) does not apply.

If Dr. Black's recommendation to not work on unprotected heights is a restriction, the presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) applies. There is ample evidence respondent accommodated Dr. Black's restriction and had 40 hours of work per week available for claimant to work. Claimant acknowledged if the restrictions of Drs. Fevurly or Poppa were imposed, respondent had 40 hours of work per week available for claimant to work. Thus, if the presumption applies, the Board finds claimant failed to rebut the presumption.

The Board agrees with the ALJ that claimant was credible. The Board does not dispute that claimant has a great deal of pain when engaging in certain work activities at respondent. Respondent should be commended for continuing to employ claimant after recovering from his injuries. However, the Board's hands are tied by the language of K.S.A. 2011 Supp. 44-510e(a)(2)(C) and (E). Claimant sustained no work disability because he failed to prove he sustained a post-injury wage loss of at least 10% which is directly attributable to the work injury and not to other causes or factors as required by K.S.A. 2011 Supp. 44-510e(a)(2)(C)(ii).

Because claimant failed to prove he sustained a wage loss of at least 10% that was directly attributable to his work injury, the issue of task loss is moot.

CONCLUSION

Claimant is entitled to a 24% whole body functional impairment, but not to permanent partial disability benefits based upon a work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[26] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the December 12, 2013, Award entered by ALJ Hursh by finding claimant is entitled to 21 weeks of temporary total disability benefits at the rate of $555 per week, or $11,655; followed by $8,276.73 in temporary partial disability benefits; followed by 94.58 weeks of permanent partial disability benefits based upon a 24% whole body functional impairment at the rate of $555 per week, or $52,491.90, for a total of $72,423.63, all of which is due and owing, less amounts previously paid. The Board affirms the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[26] K.S.A. 2013 Supp. 44-555c(j).

DISSENT

The undersigned Board Members respectfully dissent.

Respondent's argument is rooted in a concern that affirming the judge's decision will unravel the 2011 legislative changes and return us to the law of *Bergstrom*.[27] The concern is that awarding Mr. Locke a work disability, when no doctor restricted him against working 40 or more hours per week, will result in a future tidal wave of claimants manipulating their wage loss based on unprovable, merely subjective pain complaints. Such concern is justifiable, but remote to the specific facts of this case.

By way of history, the Kansas Workers Compensation Act (KWCA), as it existed prior to Substitute for House Bill 2134 becoming law effective May 15, 2011, provided that the computation of work disability was based on wage loss and task loss. The wage loss component of work disability was based on "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."[28] The Kansas Court of Appeals, when construing K.S.A. 1988 Supp. 44-510e(a), read the statute as implicitly containing a requirement that injured workers exercise good faith in attempting to mitigate their post-injury wage loss.[29]

A good faith requirement was thus read into the law, at least until *Bergstrom* was decided. Such decision, as noted by respondent counsel at oral argument in this case, "turned workers compensation on its ear in 2009." *Bergstrom* held the only factor in determining a claimant's post-injury wage loss was to compare such claimant's actual post-injury earnings to his or her pre-injury average weekly wage, without any requirement that an injured worker seek work or even attempt an employer's offer of accommodated work. Under *Bergstrom*, the reason for a claimant's post-injury wage loss is irrelevant.

Subsequent to *Bergstrom*, a number of cases allowed work disability awards where the application of *Foulk* and its progeny would not have done so.[30] The legislature undoubtedly responded to *Bergstrom* with the 2011 amendments to the KWCA. Among other changes, work disability is now based on capacity or ability to earn wages. The undersigned Board Members view the legislative changes, at least in part, as an attempt to prevent injured workers from potentially manipulating the system and inflating post-injury wage loss by not trying to mitigate damages.

---

[27] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[28] K.S.A. 44-510e(a).

[29] See *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[30] For a general discussion of various cases, see *Clark v. Eaton Corp.*, No. 1,052,143, 2013 WL 5521835 (Kan. WCAB Sept. 6, 2013) (appealed to the Kansas Court of Appeals Oct. 7, 2013).

Before discussing the changes in the law, the facts of this case show claimant and respondent had an arrangement in which claimant was explicitly permitted to self-limit his hours and his duties based on his pain. Claimant could avoid strenuous work, opt not to show up to work and could leave work early. Mr. Barnds proposed this arrangement after claimant resigned the second time. Mr. Barnds was commendable for bending over backwards to help claimant, an irreplaceable employee, and allowing ". . . claimant to accept less than full-time employment, even though no physician has recommended claimant work fewer than forty hours per week."[31]

Under the changes in the new law, work disability (permanent partial general disability compensation in excess of the percentage of functional impairment) is available when various statutory requirements are met. As required by K.S.A. 2011 Supp. 44-510e(a)(2)(C)(i), claimant has more than a 7½% whole body functional impairment caused solely by the injury. K.S.A. 2011 Supp. 44-510e(a)(2)(C)(ii) would require claimant to prove at least a 10% wage loss directly attributable to the work injury and not to other causes or factors. By statute, wage loss caused by voluntary resignation or termination for cause cannot be construed to be caused by the injury.[32] Otherwise, wage loss, as statutorily defined, is established based on an open-ended, non-exhaustive list of all factors, such as age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market.[33]

Without dispute, claimant has a post-injury wage loss of at least 10%. Unlike the judge, who concluded claimant had a 46% wage loss due to his injury, the majority concludes claimant did not prove at least a 10% wage loss directly attributable to the work injury and not to other causes or factors. However, the majority never states why claimant currently has at least a 10% wage loss.

Instead, the majority concludes the statutory presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E) was overcome and claimant's actual post-injury earnings do not reflect his post-injury wage-earning capacity, as based on its finding claimant could work 40 or more hours per week and earn at least 90% of his pre-injury average weekly wage using the restrictions (or lack of restrictions) from any of the testifying physicians. We dissenters disagree as to the rationale for the majority's conclusion.

As for physicians' opinions regarding restrictions, we agree K.S.A. 2011 Supp. 44-510e(a)(2)(E) certainly requires exploring the worker's physical capabilities. While the majority notes Drs. Black and Beatty provided no restrictions, we dissenters would find their lack of restrictions speculative and unrealistic.

---

[31] Appeal Brief of Barnds Brothers at 21.

[32] K.S.A. 2011 Supp. 44-510e(a)(2)(E)(i).

[33] See K.S.A. 2011 Supp. 44-510e(a)(2)(E).

Dr. Beatty's lack of restrictions was based on his anticipation, i.e., speculation, that claimant would not need restrictions three months after such doctor last evaluated claimant. Dr. Beatty also noted he might provide restrictions if claimant told him he was incapable of performing certain types of work. Dr. Beatty's opinion that claimant eventually would need no restrictions was issued before claimant actually returned to attempting full-time labor. As shown by the evidence, claimant, despite his best efforts, was not able to engage in full-time labor or perform the same tasks as he performed prior to his injury. Instead, the evidence shows he legitimately needs restrictions.

As for Dr. Black, she acknowledged claimant perhaps should have restrictions and maybe should have a functional capacity evaluation to test his abilities. As with Dr. Beatty, Dr. Black's opinion that claimant needed no restrictions is questionable based on claimant's demonstrated inability to work as he had prior to his injury, even though nobody questions claimant's effort or motivation. These Board Members would defer to the judge's determination that the treating doctors' opinions that no restrictions were needed were qualified opinions, subject to change and not reliable.

As for the judge adopting the permanent restrictions from Drs. Fevurly and Poppa, in part because such opinions were more current, we Board Members would agree with the majority that a more current opinion regarding restrictions is not necessarily the best opinion. However, the restrictions from Drs. Fevurly and Poppa were provided after claimant had not only concluded his treatment, but also after claimant attempted to return to full-time employment. Put simply, Drs. Black and Beatty's opinions that claimant needed no restrictions were not based on claimant's demonstrated inability to return to the same level of full-time pre-injury work.

It is true no physician restricted claimant from working full-time. It is also true that claimant, as per his agreement with Mr. Barnds, was allowed to self-limit his hours to account for his pain complaints. Of note, the judge had the firsthand opportunity to assess claimant's credibility and specifically concluded "claimant was telling the truth about how much he can work even though none of the physicians imposed a restriction on his hours. The court did not think the claimant was creating a false impression of his capabilities. He is making an honest effort to remain employed."[34] The Board majority agreed claimant was credible and actually in a great deal of pain in attempting to perform his job. However, the majority then stated K.S.A. 2011 Supp. 44-510e(a)(2) forced it to conclude claimant did not have a wage loss of at least 10% directly attributable to the injury and not to other causes or factors.

The majority does not explain why claimant has a post-injury wage loss. Is claimant's wage loss tied to laziness? Is his wage loss attributable to malingering? Is his wage loss tied to any attempt to manipulate his monetary recovery? Is claimant's wage

[34] ALJ Award at 5.

loss based on a refusal to perform work? The answer to these questions is "no." Rather, claimant's wage loss is based on the fact that he still suffers the residuals of his injuries and his choice to avoid pain. We dissenters would note that such subjective decision is potentially prone to manipulation by an unscrupulous claimant, but the evidence shows no such manipulation *in this case*. Both claimant and respondent, through Mr. Barnds, agreed claimant's pain was real and he could not work 40 hours per week. The judge, after witnessing claimant's testimony and specifically finding claimant credible, concluded claimant's wage loss was directly attributable to his work injury and not to other causes or factors.

The majority is basically following the following rule: if 40 hours of work per week is theoretically available and no physician limits claimant to less than 40 hours per week, claimant cannot receive a work disability award. Availability of full-time work and lack of restrictions are certainly factors to consider, as based on the need to consider "all factors" when determining wage loss. However, the concept that claimant can work 40 hours per week is against the weight of the evidence, and as noted above, claimant's lack of restrictions is unreasonable.

Unlike the majority, we dissenters would conclude the statutory presumption that claimant's post-injury earnings represent his post-injury wage earning capability was not rebutted. The evidence establishes:

- after his injuries, claimant attempted to return to his regular job and regular hours without restrictions, but was incapable of performing such work;
- in fact, both claimant and his boss agree, without question, that claimant, on account of his injury, is not physically able to work 40 hours per week;
- as a result, claimant is not performing his full array of pre-injury work;
- claimant is working reduced hours and easier duties at Mr. Barnds' suggestion in an effort to avoid pain and remain employed;
- claimant, who had foot and low back surgeries, is not a malingerer;
- claimant's boss agrees claimant is reliable, honest and never turned down work;
- there is no evidence of bad faith or attempts to manipulate the amount of claimant's potential recovery by either party; and
- both the judge and the Board majority specifically found claimant to be credible.

Based on the above information, these Board Members would find the presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E) was not rebutted. Claimant's actual post-injury earnings represent his wage earning capability. This is not a situation where claimant is falsifying pain complaints and reducing his hours to increase his recovery. This is not a situation where work disability is being awarded for any reason, including a claimant manipulating his or her recovery, as would be allowed under *Bergstrom*. Claimant's wage loss is directly on account of his injury. We would find that under K.S.A. 2011 Supp. 44-510e(a)(2)(C)(ii), claimant proved a 46% wage loss directly attributable to his work injury and not to other causes or factors.

Finally, while the majority rejects application of K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) (refusal of accommodated work within the authorized treating doctor's restrictions at a wage paying 90% or more of claimant's pre-injury wage shall result in a rebuttable presumption of no wage loss), we must point out that the mutual arrangement between claimant and Mr. Barnds is not akin to claimant refusing work at a wage paying 90% or more of his pre-injury average weekly wage. Rather, claimant accepted respondent's proposed part-time arrangement and is thus working at a job paying less than 90% of his pre-injury wage. The availability of more hours does not necessarily mean claimant refused such work, especially when respondent admits, through Mr. Barnds, that claimant simply cannot work 40 hours per week. We would grant claimant a work disability award.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Keith V. Yarwood, Attorney for Claimant
kyarwood@etkclaw.com

Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
cmccurdy@wallacesaunders.com

Honorable Kenneth J. Hursh, Administrative Law Judge